RECORD AND BRIEFS

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No. 16-1276

IN THE

Supreme Court of the United States

DIGITAL REALTY TRUST, INC.,

Petitioner,

v.

PAUL SOMERS,

Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF SENATOR CHARLES GRASSLEY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[*]

Senator Charles E. Grassley has authored and promoted in Congress numerous pivotal statutes that protect whistleblowers and incentivize them to help identify waste, fraud, and abuse in the American government and economy. Senator Grassley was the principal sponsor in the Senate of the False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153, and one of the Senate sponsors of the Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617. In addition, Senator Grassley helped author the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16, and was an original co-sponsor and key supporter of the Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat. 1465. Most recently, he created the Internal Revenue Service whistleblower program and with Senator Patrick Leahy authored the Federal Bureau of Investigation (FBI) Whistleblower Protection Enhancement Act of 2016, Pub. L. No. 114-302, 130 Stat. 1516. Along with Senator Ron Wyden, Senator Grassley co-created the Senate Whistleblower Protection Caucus. In more than thirty years legislating for effective whistleblower protection laws and programs, Senator Grassley has cultivated a unique expertise in what makes whistleblowing work and the invaluable role that whistleblowers play in protecting taxpayers and investors alike.

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[*] No counsel for a party has authored this brief in whole or in part, and no person or entity other than the *amicus curiae* or his counsel made any monetary contribution intended to fund the preparation or submission of this brief. Blanket consent letters on behalf of all the parties are on file with this Court.

Senator Grassley also co-authored the whistleblower provisions of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745. Although Senator Grassley did not vote in favor of the entire regulatory scheme created by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), he supports its protections for whistleblowers—which enhance those set forth in Sarbanes-Oxley—and he consulted with the drafters on whistleblower protection issues. He believes that the anti-retaliation provision of the statute protects those who report internally as well as to the Securities and Exchange Commission (SEC).

SUMMARY OF ARGUMENT

1. The Dodd-Frank Act's anti-retaliation provisions protect those who report internally as well as to the SEC. In Dodd-Frank, Congress sought to enhance the whistleblower protections and reporting provisions of the Sarbanes-Oxley Act, which apply with equal force to internal and external reports. Thus, Dodd-Frank's anti-retaliation provision expressly covers "disclosures that are required or protected" under Sarbanes-Oxley, the Securities Exchange Act of 1934 (15 U.S.C. § 78a *et seq.*), and other key federal laws. 15 U.S.C. § 78u-6(h)(1)(A)(iii). Many of these disclosures are internal because Congress understood that robust internal reporting can facilitate a culture of voluntary compliance, deter wrongdoing, and protect investors while conserving scarce government resources.

It would make no sense to read the statute to protect internal disclosures—but only if employees *also* report to the SEC. That is because some protected employees (*e.g.*, auditors and attorneys) are prohibited

from making contemporaneous reports to regulators, and more broadly because many of the salutary benefits of internal reporting would be lost if employees were required to make a simultaneous report to the government: some employees would be deterred from coming forward, while others would feel compelled to over-report in order to ensure access to Dodd-Frank's robust anti-retaliation provisions. Companies would lose valuable opportunities for voluntary compliance, and government resources would be squandered.

Indeed, the obvious effect of petitioner's interpretation will be to discourage internal reporting: If employees can only avail themselves of Dodd-Frank's robust statutory protections by providing information to the SEC, then they will have a greater incentive to bypass internal reporting systems and go straight to the government. That result would undermine many of Sarbanes-Oxley's most important reforms. It would also be ironic because the business community itself has lobbied the hardest to encourage internal reporting in lieu of disclosures to the government. Indeed, both before and after Dodd-Frank was enacted, the business community has repeatedly urged Congress and the SEC to do more to encourage or require whistleblowers to report internally first. Petitioner's position here—designed to stave off liability in this particular lawsuit—is at odds with that entire effort.

2. The broader legislative context also supports respondent's interpretation of the statute. Every modern whistleblower anti-retaliation program protects internal reports. This is true of the False Claims Act, the Whistleblower Protection Act, and the

FBI Whistleblower Protection Enhancement Act, to name a few. In each of these statutes, Congress recognized the value of internal disclosures and the need to protect them. Congress did not always use the same text to achieve this result; instead, the language used has varied depending on the context to suit the particular statutory scheme. But the trend could not be clearer.

Respondent's interpretation is the only one consistent with this prevailing trend. By expressly covering internal reports that are protected or required by Sarbanes-Oxley and other laws, Congress enacted an anti-retaliation provision that is consistent with other modern whistleblower statutes. Petitioner's interpretation, on the other hand, would constitute a substantial step backward for whistleblower protections. Congress did not take that step, and this Court should not either.

ARGUMENT

It is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States*, 508 U.S. 129, 132 (1993). This Court has been attentive to context in construing anti-retaliation provisions. For example, in *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997), the Court relied on the statutory context and purpose of the anti-retaliation provisions of Title VII of the Civil Rights Act of 1964 to hold that the term "employees," which ordinarily "would seem to refer to those having an existing employment relationship" with the employer, also included former employees. The Court acknowledged that the plain meaning of the word

"employee" supported a narrow definition, and that there were "sections of Title VII where, in context, use of the term 'employee' refers unambiguously to a current employee." *Id.* at 343. Nevertheless, the Court was unanimous in holding that in the context of the anti-retaliation provision, a broader understanding was more consistent with Congress's intent. *Id.* at 346.

Here, the legislative context around Dodd-Frank's anti-retaliation provision overwhelmingly supports respondent's interpretation of the statute. Dodd-Frank's anti-retaliation provision seeks to supplement and enhance existing whistleblower protections in the Sarbanes-Oxley Act, but it can only do so if it protects internal reporting as well as disclosures to the SEC. The broader statutory context likewise supports respondent's interpretation because every modern whistleblower anti-retaliation program protects internal reports, and Congress has repeatedly reached consensus that such protections are appropriate in a wide variety of situations. While respondent's position is consistent with this prevailing trend, petitioner's interpretation of the statute would constitute a large step backward that this Court should refuse to take.

I. The Dodd-Frank Act's Anti-Retaliation Provision Reinforces Sarbanes-Oxley By Protecting Internal Whistleblowers.

The Sarbanes-Oxley Act was enacted in the wake of major financial scandals involving companies such as Enron, WorldCom, and Tyco, whose fraudulent financial statements concealed massive malfeasance and cost investors billions of dollars. Congress sought to build a financial accountability regime from the ground up in order to protect taxpayers and investors.

Sarbanes-Oxley thus establishes standards for auditor independence, requires senior executives to take responsibility for the accuracy of their companies' financial statements, compels additional disclosures, and implements other important reforms.

The statute also includes a whistleblower protection provision, codified at 18 U.S.C. § 1514A, which protects employees who come forward with information relating to potential frauds against shareholders from retaliation by their employers. Whistleblowers had been critical to uncovering the Enron scandal, and Congress was acutely aware that complex financial and accounting fraud would be particularly difficult to sniff out without insight from within. Accordingly, Congress adopted anti-retaliation protections, taking the first step in incentivizing private sector whistleblowers. *See* S. Rep. No. 107-146, at 4-5, 18-19 (2002) (describing role of whistleblowers in Enron crisis and explaining the need for more robust and uniform whistleblower protections); *Legislative Proposals to Address the Negative Consequences of the Dodd-Frank Whistleblower Provisions: Hearing Before the Subcomm. on Capital Mkts. & Gov't Sponsored Enter. of the H. Comm. on Fin. Servs.*, 112th Cong. 10-11 (2011) (*Legislative Proposals*) (statement of Geoffrey Christopher Rapp, Professor of Law, University of Toledo College of Law) ("In recognition of this fact [that whistleblowing is the single most effective method of detecting corporate and financial fraud], the Sarbanes-Oxley Act of 2002 for the first time created a uniform Federal protection for financial fraud whistleblowers.")

Unfortunately, Sarbanes-Oxley did not prevent the financial crisis of 2008. Moreover, it emerged that

the whistleblower provision was underutilized—partially because while the statute protected whistleblowers from retaliation, it did not provide a financial incentive to disclose wrongdoing, and also because the procedural protections for whistleblowers had failed to encourage as many whistleblowers as Congress had hoped. *See Legislative Proposals* at 11; *id.* at 58 (prepared statement of Prof. Rapp) ("Empirical research on whistleblowing since the passage of Sarbanes-Oxley has lent some confirmation to [the] view that the statute was ineffective in motivating whistleblowers to bring fraud to light."). Evidence also emerged that the Department of Labor had been dismissing too many whistleblower complaints based on an erroneous, narrow interpretation of the scope of the statute. *See* News Release, *Leahy, Grassley Press for Update on Labor Department's Handling of Whistleblower Cases* (Oct. 7, 2010), https://www.grassley.senate.gov/news/news-releases/leahy-grassley-press-update-labor-department%E2%80%99s-handling-whistleblower-cases.

In the Dodd-Frank Act, Congress attempted to enact a more robust whistleblower protection provision. *See, e.g.*, *Wadler v. Bio-Rad Labs., Inc.*, 141 F. Supp. 3d 1005, 1023 (N.D. Cal. 2015) ("[T]he legislative history of Dodd-Frank indicat[es] that its purpose was to enact more stringent measures than were contained in Sarbanes-Oxley to protect whistleblowers."); *Legislative Proposals* at 11 (statement of Prof. Rapp) ("Section 922 of the Dodd-Frank Act answered the glaring need for a bounty provision for financial fraud whistleblowers."); Michael E. Clark, *The Dodd-Frank Act's Bounty*

Hunter Provisions, 44 Rev. Sec. & Commodities Reg. 31, 32 (Feb. 9, 2011) ("It is . . . not accidental that Dodd-Frank's bounty provisions in many ways resemble the [False Claims Act]'s highly successful *qui tam* provisions . . . ."). Congress thus included a "bounty" provision similar to the False Claims Act, 15 U.S.C. § 78u-6(b), as well as enhanced protections against retaliation, codified at 15 U.S.C. § 78u-6(h).

Dodd-Frank's anti-retaliation provision expressly protects three kinds of disclosures: (1) "providing information to the [SEC]"; (2) "initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information"; and (3) "making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002," the Securities Exchange Act of 1934, the federal witness protection statute, and "any other law, rule, or regulation subject to the jurisdiction of the" SEC. 15 U.S.C. § 78u-6(h)(1)(A).

All agree that many disclosures in this third category—especially those that are required or protected under Sarbanes-Oxley—are made internally to facilitate voluntary compliance with the law. For example, auditors must report illegal acts to management and to the board of directors, and may not report outside the company unless and until management and the board refuse to act appropriately. *See* 15 U.S.C. § 78j-1(b). Attorneys have similar internal reporting requirements under Sarbanes-Oxley and the SEC's rules. *See, e.g.*, *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 151 (2d Cir. 2015). And of course, every employee's reports to her supervisors about noncompliance are protected under Sarbanes-Oxley's own anti-retaliation provision.

Dodd-Frank clearly seeks to prohibit retaliation against all of these individuals. But if the anti-retaliation provision is read narrowly, as petitioner suggests, to apply only to those whistleblowers to report information to the SEC, then it will not provide any meaningful protection to attorneys, auditors, and others who report internally. That incongruity is nonsensical—and it would also discourage internal reporting, *i.e.*, the very reporting Congress sought to encourage with the third prong of Dodd-Frank's anti-retaliation provision.

Petitioner's interpretation would therefore create unnecessary and improper tension between Dodd-Frank and Sarbanes-Oxley, the statute Dodd-Frank sought to reinforce. Sarbanes-Oxley both required and encouraged the development of internal compliance and reporting systems. Those systems "were built at great cost, reportedly millions of dollars." *Legislative Proposals* at 9 (Statement of Ken Daly, President and CEO, National Association of Corporate Directors). Dodd-Frank seeks to shore those systems up by protecting whistleblowers who make disclosures required by Sarbanes-Oxley. 15 U.S.C. § 78u-6(h)(1)(A)(iii). If the word "whistleblower" is read to exclude participants in internal reporting systems, employees will have a strong incentive to bypass these mechanisms, stymying their development and rendering them ineffective. *See Bussing v. COR Clearing, LLC*, 20 F. Supp. 3d 719, 733 (D. Neb. 2014) (explaining that requiring employees to report to the SEC in order to obtain protection "would also risk frustrating companies' internal compliance programs, and could deter whistleblowers from participating in internal investigations"); *cf.* Securities Whistleblower

Incentives and Protections, 76 Fed. Reg. 34,300, 34,323 (June 13, 2011) (explaining that one of the Commission's objectives "is to support, not undermine, the effective functioning of company compliance and related systems by allowing employees to take their concerns about possible violations to appropriate company officials first while still preserving their rights under the Commission's whistleblower program").

Petitioner's interpretation will also encourage overreporting to the SEC. The Commission's resources are already strained, *see generally Oversight of the U.S. Securities and Exchange Commission: Hearing before the S. Comm. on Banking, Housing & Urban Affairs*, 114th Cong. (2016) (prepared statement of Mary Jo White, Chair, SEC), and additional reports will only exacerbate the problem by requiring the Commission to evaluate, investigate, and then sometimes take enforcement action—when an internal report could have produced a quick course-correction without any expenditure of public resources. *See, e.g.*, *Legislative Proposals* at 67 (written statement of Darla C. Stuckey, Senior Vice President–Policy and Advocacy, Society of Corporate Secretaries and Governance Professionals). This will undermine, rather than enhance, the efficient enforcement of the securities laws.

Respondent's interpretation, embraced by the SEC, would encourage internal reporting and compliance, bolstering the Sarbanes-Oxley reforms. *See Legislative Proposals* at 48 (prepared statement of Robert J. Kueppers, Deputy Chief Executive Officer, Deloitte LLP) (explaining how increased internal reporting "would allow the continuing operation of

effective internal controls, including effective controls that were put in place and strengthened as a result of Sarbanes-Oxley."). "Internal reporting serves a number of important interests—shared by employers and the SEC. It allows companies to remedy improper conduct at an early stage, perhaps before it rises to the level of a violation." *Bussing*, 20 F. Supp. 3d at 733.

For example, timely use of internal procedures gives management an opportunity to correct financial information and can help produce more accurate financial statements to investors. In hearings to consider modifying Dodd-Frank, a witness representing Deloitte LLP argued that Congress should further increase existing incentives to report internally before resorting to the SEC. "Consider a situation where an employee sees a problem late in the fourth quarter of the year but chooses to go around internal channels and report his or her concerns only to the SEC." *Legislative Proposals* at 5 (statement of Kueppers). If company management is not notified of these concerns "before year-end results are announced or before financial statements are released," then "the company may have to restate those errant financials after investors have already relied upon them." *Id.* at 6. Investors would have been in the dark, and the company exposed to liability.

Internal reporting avoids this problem by giving "the company an opportunity to correct problems before they impact the financial statements that are included in reports filed with the Commission or in financial results that are publicly announced before filing." *Legislative Proposals* at 45 (prepared statement of Kueppers). For this reason, pro-business witnesses who testified before Congress stated their

preference for sequential reporting, which would give "management, under the oversight of the audit committee and with appropriate assistance of outside auditors" the time to "move quickly to investigate, prevent a violation from occurring, or mitigate the impact of an error." *Ibid.*

These considerations explain how Dodd-Frank's protections for internal reporting shore up Sarbanes-Oxley. They also illustrate why petitioner's understanding of the relationship between these two statutes is misguided. Petitioner argues that if Dodd-Frank's whistleblower protections apply to internal reports, Sarbanes-Oxley's own whistleblower protections will have little work to do. This ignores the fact that in Dodd-Frank, Congress deliberately created protections that are more robust than Sarbanes-Oxley's—and specifically apply to reports that are required or protected by Sarbanes-Oxley. Congress's intent to expand and enhance whistleblower protection in this area is therefore self-evident. The fact that Congress left Sarbanes-Oxley's more limited whistleblower protections on the books does not suggest that Dodd-Frank's anti-retaliation provision should be read narrowly; it merely reflects Congress's understanding that it needed to add to, not subtract from, the protections available to employees. *Kramer v. Trans-Lux Corp.*, No. 11-cv-1424, 2012 WL 4444820, at *5 (D. Conn. Sept. 25, 2012) ("Yet the Dodd-Frank Act appears to have been intended to expand upon the protections of Sarbanes-Oxley, and thus the claimed problem [that the SEC's interpretation allows potential plaintiffs to pursue claims under Dodd-Frank that they otherwise would have pursued under Sarbanes-Oxley] is no problem at all.") Moreover, the

overlap between the two sets of provisions is not complete: for example, the Sarbanes-Oxley provisions still authorize an administrative remedy that Dodd-Frank's provisions do not—and some employees may prefer to go that route rather than litigate. Still other employees may choose to proceed under both statutes in parallel. *See, e.g.*, *Erhart v. BofI Holding, Inc.*, --- F. Supp. 3d ----, 2017 WL 4005434, at *19 (S.D. Cal. Sept. 11, 2017); *Wussow v. Bruker Corp.*, No. 16-cv-444, 2017 WL 2805016, at *7 (W.D. Wis. June 28, 2017).

Petitioner's position—and that of its *amici*—is also surprising because it was the business community that urged Congress to favor internal reporting in order to prevent overreporting to the SEC. Indeed, the business community felt so strongly about the importance of internal reporting and maintaining use of their Sarbanes-Oxley compliance measures that it asked the SEC and Congress to include a requirement for all employees to report to immediate supervisors prior to submitting complaints to the SEC. *See, e.g.*, Letter from Paul Schett Stevens, President & CEO, Inv. Co. Inst., to Chairman Hon. Scott Garrett and Ranking Member Hon. Maxine Waters (Dec. 13, 2011), https://www.ici.org/pdf/12_hr2483_pss_ltr.pdf (expressing support for proposed legislation that would require whistleblowers to report through internal channels before reporting to the SEC); Apache Corp. et al. Comment Letter on Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 (File No. S7-33-10) at 2-4 (Feb. 18, 2011), https://www.sec.gov/comments/s7-33-10/s73310-283.pdf (urging the SEC to use the "extraordinarily

broad rulemaking authority" that "Congress has conferred" to "make utilization of effective internal reporting procedures a precondition for receiving an award.")

In fact, the testimony to Congress suggests that members of the business community, while advocating for internal reporting requirements, assumed or took for granted that Dodd-Frank's anti-retaliation provisions apply to internal whistleblowers. *See Legislative Proposals* at 46 (prepared statement of Kueppers) (arguing that whistleblowers should first report internally and noting that "[w]hile we recognize that there could be circumstances where a potential whistleblower believes that the company's internal program is ineffective or fears retaliation, *the Dodd-Frank Act already has taken that into consideration by including anti-retaliation provisions*") (emphasis added). Similarly, it was the business community that successfully lobbied the SEC to adopt rules favoring internal reporting. *See* 76 Fed. Reg. at 34,300, 34,323.

Now, however, it appears that while businesses are happy to require their employees to report internally, they are unwilling to endorse protection for employees who would make those very reports. That is hypocrisy, pure and simple, and Congress did not endorse it. This Court should read the statute to protect internal reporters, consistent with Congress's desire to shore up Sarbanes-Oxley and enhance whistleblower protections in the wake of the 2008 financial crisis.

II. Protection For Internal Whistleblowers Is Consistent With Every Other Major Whistleblower Anti-Retaliation Program.

Another strong fact supporting respondent's interpretation of the statute is that every major modern whistleblower anti-retaliation program protects internal reporting. The Court "assume[s] that Congress is aware of existing law when it passes legislation." *Hall v. United States*, 566 U.S. 506, 516 (2012) (quotation marks omitted). Here, Congress was well aware that effective whistleblower programs require robust anti-retaliation protections when it enacted Dodd-Frank—and it was equally mindful of the strong trend toward expanding those anti-retaliation protections to internal reporting. Consequently, it would not be "logical to conclude that Congress intended to encourage an across-the-board departure from the general practice of first making an internal report." *Bussing*, 20 F. Supp. 3d at 733. At the absolute minimum, one would expect there to be some evidence in the legislative history to support the proposition that Congress intended to enact a uniquely narrow anti-retaliation provision, if indeed that had been the case. *See* 76 Fed. Reg. at 34,326 (rejecting a proposed comment that would cause Dodd-Frank's anti-retaliation provisions to "deviate from the operation of other established Federal whistleblower award programs" when there was "no indication in the text or legislative history of Section 21F that Congress intended that result"). No such evidence exists.

Indeed, time and again, members of Congress from both parties have reached consensus over the proposition that whistleblowers—including those who

report internally—ought to receive the strongest anti-retaliation protections available. It is fair to say that nobody who takes whistleblower protection seriously would urge a contrary result. Petitioner's reading of the statute would buck that consensus, forcing a rollback that no program in recent years has undertaken and that is plainly at odds with the purpose of whistleblower programs—to uncover and combat waste, fraud, and abuse.

A. Major Whistleblower Programs Extend Protection For Internal Whistleblowers In Order To Effectively Protect The Public Against Fraud.

Congress understands that anti-retaliation protections for internal whistleblowers are necessary. This belief has driven numerous recent updates to federal whistleblower programs that consistently strengthen protections for internal whistleblowers. Such developments have occurred across the board—for uncovering wrongdoing against the government, within the government, and in the private sector.

1. False Claims Act

As the "most successful anti-fraud act in the United States," the False Claims Act (FCA), provides a natural starting point for examining trends in federal whistleblower programs. *See The False Claims Act Is America's Most Important Whistleblower Law*, National Whistleblower Center, http://www.whistleblowers.org/resources/false-claims-act (last visited Oct. 17, 2017). Indeed, its highly successful *qui tam* provisions enabled the Department of Justice (DOJ) to recover over $37 billion since Senator Grassley's 1986 amendments. *See* Civil

Division, DOJ, Fraud Statistics – Overview, October 1, 1987 – September 30, 2016, https://www.justice.gov/opa/press-release/file/918361/download (Dec. 13, 2016). It is no surprise, then, that the FCA provided a model for Dodd-Frank's bounty program.

More recent changes to the FCA follow the trend of expanding whistleblower protections. The Fraud Enforcement and Recovery Act of 2009 (FERA), Pub. L. No. 111-21, 123 Stat. 1617—also a reaction to the 2008 financial crisis—preceded Dodd-Frank by a year. *See Prepared Statement of Senator Chuck Grassley of Iowa, The Need for Increased Fraud Enforcement in the Wake of Economic Downturn: S. Comm. on the Judiciary* (Feb. 11, 2009), https://www.grassley.senate.gov/news/news-releases/need-increased-fraud-enforcement. Broadly, FERA sought to "increase accountability for the corporate and mortgage frauds" that contributed to the crisis. S. Rep. No. 111-10, at 1 (2009). Moreover, Congress knew that recovery from the crisis would require a massive public expenditure—and it was critical to protect scarce taxpayer dollars from fraud and to ensure their proper use.

Specifically as to whistleblowers, Congress amended the FCA to overrule judicial precedent that had interpreted the anti-retaliation provisions too narrowly. The legislation "ensure[d] that the law adheres [to the] original intent of the FCA." *See Prepared Statement of Senator Chuck Grassley of Iowa, Senate Floor Debate on Fraud Enforcement and Recovery Act* (Apr. 20, 2009), https://www.grassley.senate.gov/news/news-releases/false-claims-act-and-fraud-enforcement. Among other changes, FERA broadened the definition of protected

activity to include "efforts to stop 1 or more violations" of the FCA. 31 U.S.C. § 3730(h)(1). This broad language "is intended to make clear that this subsection protects not only steps taken in furtherance of a potential or actual qui tam action, but also steps taken to remedy the misconduct through methods such as internal reporting to a supervisor or company compliance department." 155 Cong. Rec. E1295-03, E1300 (May 18, 2009). Courts have rightfully interpreted this change as covering internal efforts to stop violations. *See, e.g.*, *United States ex rel. Chorches v. Am. Med. Response, Inc.*, 865 F.3d 71, 97 (2d Cir. 2017); *Jones-McNamara v. Holzer Health Sys.*, 630 Fed. Appx. 394, 399 (6th Cir. 2015); *United States ex rel. Grenadyor v. Ukrainian Vill. Pharmacy, Inc.*, 772 F.3d 1102, 1108-09 (7th Cir. 2014).

The FERA amendments to the FCA thus sought to protect whistleblowers apart from whether they resort to the FCA's *qui tam* bounty provisions. The statute illustrates Congress's general understanding that anti-retaliation protections should be broader than bounty provisions because it does not make sense to encourage an official report or a lawsuit every time an employee investigates a potential compliance issue—and it therefore does not make sense to require employees to commence official proceedings simply to obtain basic protection for their livelihoods. Dodd-Frank was enacted against the same backdrop, with the same understanding.

2. *Whistleblower Protection Act and Whistleblower Protection Enhancement Act*

The steady march toward increasing protections to internal whistleblowers is also reflected in statutes addressing wrongdoing within the government. Congress passed the Whistleblower Protection Act of 1989 (WPA), Pub. L. No. 101-12, 103 Stat. 16, to bolster the largely unsuccessful attempts of the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111, to encourage and protect whistleblowing activity among federal government employees. 135 Cong. Rec. S2779-01, S2787 (Mar. 16, 1989) (noting that the CSRA had done "little to encourage Federal employees' confidence in their ability to reveal problems in their agencies"); *see also id.* at S2782 (noting that "a string of restrictive Merit Systems Protection Board and federal court decisions" had made it "unduly difficult for whistleblowers" to prevail).

As had happened with the FCA, courts over time improperly narrowed the WPA contrary to Congress's intent, and Congress subsequently sought to clarify its preference for broader whistleblower protections. *See* S. Rep. No. 112-155, at 4-5 (2012) (expressing concern that "the Federal Circuit and the [Board] have continued to undermine the WPA's intended meaning by imposing limitations on the kinds of disclosures by whistleblowers that are protected."). In response, Congress passed the Whistleblower Protection Enhancement Act of 2012 (WPEA), Pub. L. No. 112-199, 126 Stat. 1465. As with the FERA amendments, the WPEA responded directly to the judiciary's narrowing of protections specifically with respect to

internal whistleblowers. S. Rep. No. 112-155 at 5; *see also Congress Strengthens Whistleblower Protections for Federal Employees*, ABA Section of Labor and Employment Law Flash (Nov.-Dec. 2012), https://www.americanbar.org/content/newsletter/groups/labor_law/ll_flash/1212_abalel_flash/lel_flash12_2012spec.html.

Consistent with the recent expansion of protections to whistleblowers, the WPEA clarified that the WPA's anti-retaliation provisions cover whistleblowers that report internally, including to persons or supervisors that participated in the wrongdoing. The WPEA also clarifies that employees are not excluded from protection for making disclosures during the course of their normal duties. *See* § 101(f), 126 Stat. at 1466 (codified at 5 U.S.C. § 2302(f)). The statute also enhanced judicial remedies for these internal reporters. *See* § 107(b), 126 Stat. at 1469.

3. FBI Whistleblower Protection Enhancement Act

In December 2016, Congress made its latest mark in the now-familiar pattern of updating and expanding whistleblower laws to respond to practical realities. This time, it unanimously extended anti-retaliation protections specifically to internal whistleblowers in the FBI. The FBI Whistleblower Protection Enhancement Act of 2016, Pub. L. No. 114-302, 130 Stat. 1516, was enacted to close a loophole in federal employee protections created in DOJ regulations. The DOJ's rules "only protect[ed] FBI employees who experience reprisal after they report wrongdoing to a handful of offices or individuals," even though FBI

policy "encourages employees to report through their chain of command." 162 Cong. Rec. S7128-05, S7129 (Dec. 9, 2016) (statement of Sen. Grassley). This was unacceptable to a unanimous Congress, which rejected the proposal to condition protection for whistleblowers on their participation in a convoluted internal reporting scheme.

The reasoning behind that decision is instructive. DOJ's rules for FBI employees failed to protect whistleblowers that first reported wrongdoing to their immediate supervisor. This went against both common sense and common practice, *i.e.*, that an employee's first instinct and action is often to report to his or her boss. *Cf. Legislative Proposals* 11 (statement of Prof. Rapp) ("Most whistleblowers see themselves as loyal employees and they often blow the whistle out of a desire to help their firms."). It was illogical for the law to attempt to broadly encourage fraud disclosure yet deny protection for the most obvious report.

B. Only Respondent's Interpretation Is Consistent With The Prevailing Trend Of Major Whistleblower Programs.

Only respondent's interpretation of Dodd-Frank is consistent with the overwhelming legislative trend toward comprehensive protection for whistleblowers—including for internal reporting. It would have been extremely strange for Congress to have explicitly protected all "disclosures that are required or protected under" Sarbanes-Oxley, the Exchange Act, and every other law enforced by the SEC—including myriad required and recommended internal reports—while denying protection to the employees who make those very reports. 15 U.S.C. § 78u-6(h)(1)(A)(iii).

Respondent's reading, by contrast, is the most consistent not only with the clear import of the statutory text, but also with the functioning of every other modern whistleblower anti-retaliation program.

Congress has repeatedly demonstrated through its updates to major whistleblower programs a sophisticated understanding of what makes such laws effective. That understanding unmistakably includes protecting internal disclosures. Yet petitioner's interpretation would reintroduce to Dodd-Frank exactly the same problems that Congress has eliminated in other laws. For instance, a major reason that Congress passed the FBI WPEA is because it realized that requiring vague and confusing statutory procedures was impeding whistleblowers. As many have noted, those same administrated complications posed similar roadblocks to Sarbanes-Oxley's success in the years following its passage, rendering it less effective than originally hoped. That would be a substantial step backwards that Congress has consistently refused to take; this Court should refuse as well.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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